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MAGISTRATE TRIALS: THE NEW HIERARCHY OF CLASS 2 ADJUNCTS AND ARTICLE III JUDGES

The Federal Magistrates Act¹ (the Magistrates Act) confers upon United States magistrates broad powers to aid in the administration of justice at the trial court level.² Section 636(c) of the Magistrates Act allows magistrates to conduct civil trials and to enter judgments with the consent of the parties.³ The statute requires that a federal district judge specially designate the magistrate to exercise this power, and sets forth procedures to ensure that no litigant is coerced to consent to a referral.⁴ A magistrate enjoys neither the life tenure nor the salary protection afforded federal judges by article III of the United States Constitution.⁵ In-

¹ 28 U.S.C. §§ 631-639 (1982).

² See *id.* § 636. The Magistrates Act, drafted in response to increased dissatisfaction with the United States commissioner system, was adopted to reduce federal docket congestion and to "reform the first echelon of the Federal judiciary." H.R. REP. NO. 1629, 90th Cong., 2d Sess. 13-14, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 4252, 4253-54. The Magistrates Act allows magistrates to fulfill a broad range of functions in addition to those formerly performed by commissioners. See 28 U.S.C. § 636 (1982); Spaniol, *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565, 568. These functions were expanded, enumerated and clarified by amendment in 1976. Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729; see *Jurisdiction of United States Magistrates: Hearings on S. 1238 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975). The amendments allow magistrates to hear and determine all but eight case-dispositive motions, subject to review by a district judge under a clearly erroneous standard. 28 U.S.C. § 636(b)(1)(A) (1982). Exempted motions may be referred to a magistrate for fact-finding and disposition subject to a *de novo* determination by the district judge. *Id.* § 636(b)(1)(C) (1982).

³ 28 U.S.C. § 636(c)(1) (1982). The consensual trial provision states in part:

(1) Upon the consent of the parties, a full-time United States magistrate . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specifically designated to exercise such jurisdiction by the district court. . . .

Id. See generally McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 345-62 (1979) (discussion of the development of the magistrate system).

⁴ 28 U.S.C. § 636(c)(2) (1982). The Act offers litigants the option of having an action referred to a magistrate. *Id.* Each litigant must communicate his decision to the court clerk; thereafter neither the magistrate nor the judge may attempt to persuade either party to consent to a magistrate trial. *Id.*

⁵ Compare 28 U.S.C. § 631(e) (1982) (providing for limited terms for magistrates) with U.S. CONST. art. III, § 1 (authorizing life tenure for federal judges). Article III states in pertinent part:

stead, he functions as an "adjunct" to the district court.⁶ In 1982, the Supreme Court, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁷ held that the non-article III adjunct scheme created by the 1978 Bankruptcy Reform Act (the Bankruptcy Act)⁸ unconstitutionally "removed most, if not all, of 'the essential attributes of the judicial power' from the Art[icle] III district court, and . . . vested those attributes in a non-Art[icle] III adjunct."⁹ The *Northern Pipeline* decision led a panel of the Court

The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1. The Framers considered the tenure and salary provisions of article III essential to maintaining the structural integrity of the Federal Government. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982). Not only were these guarantees viewed as a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other," *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam), but also as a means of ensuring impartial adjudication by Federal judges, *THE FEDERALIST* No. 78, at 529 (A. Hamilton) (J. Cooke ed. 1961) ("Periodical appointments, however regulated, . . . would, in some way or other, be fatal to [the courts'] necessary independence.") The "good Behaviour" clause is construed as assuring life tenure to article III judges, *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955), while the "Compensation" clause guarantees fixed salaries, *United States v. Will*, 449 U.S. 200, 220-21 (1980). See *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933) (noting Framers' objection to dependence on King's will for tenure and salary of members of the judiciary). The Framers deemed these protections necessary to ensure that the judicial power of article III would be exercised by judges free from majoritarian pressures or fear of reprisal or rebuke. *Id.* at 530.

Federal magistrates, on the other hand, serve for eight-year terms, 28 U.S.C. § 631(e) (1982), and may be removed from office for incompetence, misconduct, neglect of duty, or physical or mental disability, *id.* § 631(h). Article III judges may only be removed by impeachment for "high Crimes and Misdemeanors." U.S. CONST. art. II, § 4. While magistrates are statutorily assured an irreducible salary during their term in office, Congress is free to amend or abolish the statute. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 593 (1962) (Douglas, J., dissenting).

⁶ See *infra* notes 23-24 and accompanying text.

⁷ 458 U.S. 50 (1982).

⁸ 28 U.S.C. § 1471 (1982). The Bankruptcy Reform Act of 1978 (Bankruptcy Act), which substantially expanded the jurisdiction of bankruptcy judges, created bankruptcy courts in each district as adjuncts to the district court. *Id.* § 151(a). These courts were granted jurisdiction over "all civil proceedings arising under . . . or related to cases under title 11 [the Bankruptcy title]," *id.* § 1471(b); see *id.* § 1471(c). Bankruptcy judges were to be appointed by the President to serve for 14 year terms, with the advice and consent of the Senate, *id.* §§ 152, 153(a), and were to be subject to removal by the circuit council for "incompetency, misconduct, neglect of duty, or physical or mental disability," *id.* § 153(b). Their salaries were subject to statutory diminution by Congress pursuant to the Federal Salary Act, 2 U.S.C. §§ 351-361 (1982); 28 U.S.C. § 154 (1982). Bankruptcy judges could exercise all ordinary "powers of a court of equity, law, and admiralty." *Id.* § 1481.

⁹ 458 U.S. at 87 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). In *Northern Pipeline*, appellant, *Northern Pipeline Construction Co.* (Northern), filed suit against appellee, *Marathon Pipe Line Co.* (Marathon), in the bankruptcy court seeking "damages for alleged

of Appeals for the Ninth Circuit to conclude, in *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc. (Pacemaker I)*,¹⁰ that section 636(c) of the Magistrates Act could not withstand constitutional analysis.¹¹ The Ninth Circuit subsequently withdrew its

breaches of contract and warranty, as well as for alleged misrepresentation, coercion and duress," under the jurisdictional provisions of the Bankruptcy Act, 28 U.S.C. § 1471(b)-(c) (1982). 458 U.S. at 56-57. Marathon moved for dismissal on the ground that the bankruptcy judge, who lacked life tenure and salary protection, could not constitutionally exercise judicial power to decide traditional law and equity claims related only tangentially to a petition in bankruptcy. *Id.* The bankruptcy judge denied Marathon's motion to dismiss, but the motion was granted on appeal by the district court, which held that "the delegation of authority in 28 U.S.C. § 1471" to bankruptcy judges to decide cases not arising under title 11 was unconstitutional. *Id.* at 57. On appeal to the Supreme Court, a plurality of four justices affirmed the district court. *Id.* at 88. Justice Brennan, writing for the plurality, noted that "[t]he Court has only recently reaffirmed the significance . . . of the Framers' design" of our tripartite system of government which demands a judiciary "independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial," *id.* at 58, and concluded that the "clear institutional protections" of article III designed to maintain an independent judiciary must "be jealously guarded," *id.* at 60. After noting that bankruptcy judges do not enjoy life tenure or salary protection, *id.* at 60-61; see 28 U.S.C. §§ 153-154 (1982), the plurality concluded that bankruptcy judges "do not enjoy the protections constitutionally afforded to Art. III judges," 458 U.S. at 60. The Court then rejected the two alternative arguments set forth by the appellants: (1) bankruptcy courts were valid as legislative courts established pursuant to Congress' enumerated article I powers, *id.* at 62; see *infra* note 21, and; (2) if the bankruptcy related action brought by Northern required article III adjudication, this requirement was satisfied by Congress' designation of bankruptcy courts as "adjuncts" to the district courts, *id.* at 62-63; see *infra* note 23. See 458 U.S. at 70-71, 87. In sum, the plurality held that the 1978 Bankruptcy Act "suggest[ed] unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts," 458 U.S. at 84, concluding that "the broad grant of jurisdiction to the bankruptcy courts" was unconstitutional, *id.* at 87.

Concurring in the judgment, Justice Rehnquist, joined by Justice O'Connor, stated that he "would [only] hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III," but "agrees[d] with the plurality that this grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts under § 1471." *Id.* at 91-92 (Rehnquist, J., concurring). Chief Justice Burger, noting the effect of Justice Rehnquist's concurrence on the plurality's decision, emphasized that "the Court's holding is limited to the proposition . . . that a 'traditional' state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an 'Article III court' if it is to be heard by any court or agency of the United States." *Id.* at 92 (Burger, C. J., dissenting).

¹⁰ 712 F.2d 1305 (9th Cir. 1983), *rev'd en banc*, 725 F.2d 537 (9th Cir. 1984).

¹¹ 712 F.2d at 1313. Judge Boochever, writing for a unanimous panel, found the magistrate system irreconcilable with any constitutionally recognized category of federal judicial officers. *Id.* at 1309-10. Initially, the court noted that magistrates lack life tenure and constitutional salary protection and, therefore, could not be classified as article III judges. *Id.* at 1309. The broad subject-matter jurisdiction exercised by magistrates foreclosed their classification as article I legislative judges. *Id.* Finally, the court rejected Congress' classification

opinion and ordered a rehearing en banc for reconsideration of the constitutional issues.¹² One month later, the Court of Appeals for the Third Circuit, in *Wharton-Thomas v. United States*,¹³ explicitly rejected the reasoning of the *Pacemaker I* panel and, emphasizing the provision for consent of the litigants, upheld the constitutionality of section 636(c).¹⁴ Subsequent to the *Wharton-Thomas*

of the magistrate system as creating valid adjuncts to the district courts. *Id.* at 1309-10.

Turning to the "saving provisions" of the Act, the court considered the statutory provision for litigant consent, *id.* at 1310-12; see 28 U.S.C. § 636(c)(1) (1982), internal delegation of judicial power, 712 F.2d at 1312-13; see 28 U.S.C. § 636(c)(1) (1982), and the availability of appellate review by an article III judge, 712 F.2d at 1313; see 28 U.S.C. § 636(c)(3) (1982). The panel found that the right to an article III adjudication was more than a due process right. 712 F.2d at 1312. Thus, to the extent that this right implicated the framework of government, it could not simply be waived by consent of the parties. *Id.* Rejecting the contention that derivation of the magistrate's power from within the judicial branch cured any separation of powers concerns, Judge Boochever noted that a magistrate's independence could be as easily curtailed by pressures from within the judiciary as from the coordinate branches of government. *Id.* at 1312-13; see Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560, 591 (1980). Finally, the court concluded that article III requirements could not be satisfied by the possibility of appellate review by an article III tribunal since "'constitutional requirements for the exercise of judicial power must be met at all stages of adjudication.'" 712 F.2d at 1313 (quoting *Northern Pipeline*, 458 U.S. at 86 n.39).

¹² 718 F.2d 971, 972 (9th Cir. 1983).

¹³ 721 F.2d 922 (3d Cir. 1983).

¹⁴ *Id.* at 929-30. The court declined to follow the *Pacemaker I* panel "because it [read] too much into *Northern Pipeline*." *Id.* at 930. While the *Wharton-Thomas* court characterized the *Pacemaker I* opinion as "a thorough and thoughtful one," the court found that the separation of powers concerns underlying the *Northern Pipeline* plurality's rationale were not implicated by the magistrate system since the only potential threats to the magistrates' independence would come from the judicial branch and not from Congress. *Id.* at 927. The *Wharton-Thomas* court concluded that it is unlikely that a district judge would attempt to influence a magistrate's decision, but that even if this were to occur, such conduct would implicate due process rights, not article III concerns. *Id.* at 927 n.8. The Third Circuit also rejected the contention of the *Pacemaker I* panel that since article III is jurisdictional in nature, and jurisdiction cannot be conferred by consent of the parties, the parties cannot consent to trial by a non-article III judge in federal court. *Id.* at 926; see *Pacemaker I*, 712 F.2d at 1312. Further, the *Wharton-Thomas* court noted that the Bankruptcy Act struck down in *Northern Pipeline* did not provide for litigant consent. 721 F.2d at 925-26. Rather than adopt the holding of the *Northern Pipeline* plurality, the court adopted "the holding agreed on by a majority of the Court." *Id.* at 926; see *Northern Pipeline*, 458 U.S. at 92 (Burger, C.J., dissenting); *supra* note 9. The Third Circuit also found "other, albeit older" Supreme Court precedent to support its view of the impact of consent. 721 F.2d at 928, (citing *Kimberly v. Arns*, 129 U.S. 512, 524 (1889); *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123, 128 (1864)). The *Wharton-Thomas* court concluded that the presence of consent, combined with the statutory provisions for district court power to vacate a reference, 28 U.S.C. § 636(c)(6) (1982), judicial appointment and removal of magistrates, *id.* § 631(a), (i), special designation of magistrates to try cases, *id.* § 636(c)(1), and the right to appeal to a district judge or the court of appeals, *id.* § 636(c)(3)-(5), ensured the constitutionality of § 636(c). 721 F.2d at 930.

decision, the Ninth Circuit reversed the holding in *Pacemaker I* and upheld section 636(c) in *Pacemaker II*.¹⁵ One week later, in *Collins v. Foreman*,¹⁶ the Court of Appeals for the Second Circuit followed the reasoning of *Wharton-Thomas* and *Pacemaker II* and affirmed the constitutionality of the statute.¹⁷

¹⁵ *Pacemaker Diagnostic Clinic, Inc. v. Instrumedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc) (*Pacemaker II*), *rev'g* 712 F.2d 1305 (1983). The *Pacemaker II* majority viewed the Magistrates Act as invoking two components of the separation of powers: one involving an individual and a governmental branch, the other component involving relations among the three branches. 725 F.2d at 546. While acknowledging "the premise that Article III adjudication is, in part, a personal right of the litigant," *id.*, the court concluded that the first component of the separation of powers may be waived by the litigants as long as the right has been "voluntarily relinquished," *id.* at 543. Section 636(c), the Ninth Circuit observed, does not invoke the ordinary separation of powers issue, rather, "[t]he potential for disruption is . . . the erosion of the central powers of the judiciary by permitting it to delegate its own authority." *Id.* at 544. The majority concluded that the statute contained sufficient protections to ensure judicial control of potentially excessive delegation, the same four statutory provisions emphasized by the *Wharton-Thomas* court. *Id.* at 545-46; *see supra* note 14. Concluding that the statute contained adequate protections to overcome claims of invalidity, the *Pacemaker II* majority held that "consensual reference of a civil case to a magistrate is constitutional." 725 F.2d at 547.

The dissent, authored by Judge Schroeder, found the three major assumptions underlying the majority's reasoning to be fallacious. *Id.* at 547 (Schroeder, J., dissenting). First, the dissent rejected the majority's contention that consent is important to a constitutional analysis, arguing that since "the judicial power of the United States is conferred upon Article III judges by the Constitution," consent was "simply irrelevant to the . . . proper allocation of judicial power under the Constitution." *Id.* at 550 (Schroeder, J., dissenting). Second, while the majority found that article III control over magistrates ensured the constitutional application of the system, *see id.* at 544-45, in reality, such control prevented independent decisionmaking, since article III requires independence from other article III judges, not merely from the coordinate branches, *id.* at 552 (Schroeder, J., dissenting). Finally, Judge Schroeder contended that the voluntariness of litigant consent under the Act was illusory, since Congress itself admitted that magistrate trials were intended in part to serve as a poor man's court. *Id.* at 553-54 (Schroeder, J., dissenting); *see* S. REP. NO. 74, 96th Cong., 1st Sess. 4, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1469, 1472. The dissent concluded that such "economic coercion," when combined with the subtle pressuring of litigants by overworked district judges to take cases to magistrates, rendered the consensual reference system violative of article III. *Id.* at 554 (Schroeder, J., dissenting).

¹⁶ 729 F.2d 108 (2d Cir. 1984).

¹⁷ *Id.* at 117-19. The Second Circuit, in a unanimous panel opinion by Chief Judge Feinberg, held that "section 636(c) does not violate [the doctrine of] separation of powers." *Id.* at 114. The panel noted that while § 636(c) allowed the district judge to delegate more authority to the magistrate than the Supreme Court approved in *United States v. Raddatz*, 447 U.S. 667, 683-84 (1980), the statute contained provisions for special trial designation of magistrates, judicial appointment and removal, and district court power to vacate a reference, and thus had no effect on the "allocation of power between Congress and the district courts" approved in *Raddatz*. *Collins*, 729 F.2d at 115.

The *Collins* court held that a provision for district court *de novo* review was unnecessary when the parties consented to the reference. *See id.* at 116. The panel noted the impact of consent in three important areas: First, while consent could not confer jurisdiction, it

This Note will extract from *Northern Pipeline* the constitutional principles relevant to an analysis of section 636(c) of the Magistrates Act. After noting the failure of the courts of appeals to consider a crucial theme underlying the *Northern Pipeline* decision, a judicial narrowing of the statute will be suggested to align section 636(c) with the *Northern Pipeline* Court's perceptions of article III. Lastly, the Magistrates Act will be assessed within the structural context of the federal judicial system.

Formulating a Constitutional Doctrine of Class 2 Adjuncts

The threshold question presented by section 636(c) is whether Congress may constitutionally implement a nationwide system that permits the district court, with consent of the parties, to delegate decisionmaking power to a non-article III officer. Although the *Northern Pipeline* Court had no occasion to consider the effect of consent on the limits of permissible delegation of article III judicial power,¹⁸ the Court's analysis of the doctrine of article III courts provides a framework within which section 636(c) may be evaluated.¹⁹ The Court described two ways in which Congress could assign adjudicatory functions to a non-article III tribunal consistently with the "principle that the judicial power of the United States must be vested in Art[icle] III courts."²⁰ First, the Court identified three limited situations wherein Congress may create "legislative courts" pursuant to its article I powers.²¹ These

could validly act as "a necessary condition for the exercise of jurisdiction," *id.* at 119; second, consent could "affect the limits of permissible delegation," *id.*; and third, consent provides a structural limitation on the magistrate system by preventing wholesale delegation of judicial power to non-article III adjuncts, *id.* Finally, the Second Circuit concluded that no due process concerns could arise from a § 636(c) reference as long as the reference was uncoerced and procedurally safeguarded. *Id.* at 120.

The courts of appeal for the First and Fifth Circuits have subsequently affirmed the constitutional analysis of § 636(c) first introduced by the *Wharton-Thomas* court. See *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32, 34-35 (1st Cir. 1984).

¹⁸ See *Pacemaker II*, 725 F.2d at 542. The *Collins*, *Pacemaker II*, and *Wharton-Thomas* courts all noted dicta in *Northern Pipeline* indicating the potential importance of consent to a constitutional analysis. *Collins*, 729 F.2d at 119; *Pacemaker II*, 725 F.2d at 542; *Wharton-Thomas*, 721 F.2d at 926.

¹⁹ See *Collins*, 729 F.2d at 112 (*Pacemaker I*, *Wharton-Thomas*, and *Pacemaker II* all relied on *Northern Pipeline* in evaluation of the constitutionality of § 636(c)).

²⁰ 458 U.S. at 77.

²¹ See *id.* at 70. The *Northern Pipeline* plurality recognized that Congress, pursuant to article I of the United States Constitution, has established courts with judges who are not protected by the tenure and salary provisions of article III, nor subject to its jurisdictional

tribunals, the Court maintained, are historically recognized exceptions to the "literal command" of article III.²² Second, the Court

limitations. *Id.* at 60-62; see U.S. CONST. art. I, § 8, cl. 9. While the language of this clause, which grants Congress power to "constitute Tribunals inferior to the Supreme Court," U.S. CONST. art. I, § 8, cl. 9, has been construed to refer to only the "inferior courts" mentioned in article III, see *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962), Congress has nevertheless used its inherent power under article I to create courts that exist independently of the article III judicial system, see Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOKLYN L. REV. 207, 207 n.1 (1983). The creation of these courts, which are interchangeably referred to as "article I courts" or "legislative courts," has been upheld by the Supreme Court for over 150 years as within Congress' article I powers. See, e.g., *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828). In *Northern Pipeline*, however, Justice Brennan construed these precedents to recognize the validity of only three types of article I tribunals: territorial courts, courts-martial, and courts established for the purpose of adjudicating "public rights." See 458 U.S. at 64-67. Creation of these courts has been upheld because Congress acted pursuant to an unusual grant of power that was "consistent with, rather than threatening to, the constitutional mandate of the separation of powers." *Id.* at 64; see *infra* note 22 and accompanying text.

The doctrine of territorial courts was initially set forth by Chief Justice Marshall in *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). The Chief Justice reasoned that the source of territorial judicial power did not spring from article III, but rather from article IV, which allows Congress to make "all needful Rules and Regulations respecting the Territory" of the United States, U.S. CONST. art. IV, § 3, cl. 2; 26 U.S. at 546. See *Northern Pipeline*, 458 U.S. at 64-65.

In addition, the *Northern Pipeline* Court recognized that Congress has established article I power to create military courts outside the realm of article III. 458 U.S. at 66; see U.S. CONST. art. I, § 8, cls. 13-14 (granting Congress power to "provide and maintain a Navy" and "to make Rules for the Government and Regulation of the land and naval forces").

Lastly, the *Northern Pipeline* Court recognized Congress' power to create legislative courts for the purpose of adjudicating "public rights." 458 U.S. at 67. Public rights are "matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments'" *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)), "and only to matters that historically could have been determined exclusively by those departments." 458 U.S. at 67-68 (citing *Ex Parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). It is from this doctrine that Congress has derived its constitutionally recognized power to create administrative agencies. See, e.g., *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977).

²² 458 U.S. at 64. The plurality contended that article I courts could be reconciled with article III if viewed within "the historical context in which the Constitution was written." *Id.* Thus, the *Northern Pipeline* Court noted, article I courts have never been permitted to adjudicate matters which are "inherently judicial"; that is, matters that traditionally have been resolved by courts at common law or in equity, rather than legislative or executive bodies. *Id.* at 68 (quoting *Ex Parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). The appellants in *Northern Pipeline* contended that a fourth category of legislative courts should be created pursuant to Congress' power to establish "'uniform Laws on the subject of Bankruptcies throughout the United States,'" *id.* at 72 (quoting U.S. CONST. art. I, § 8, cl. 4), but the plurality observed that a strict historical approach was necessary in permitting the formation of legislative courts, since failure to enforce a "limiting principle" would allow Congress to create a network of legislative courts that ultimately could replace the article III judicial system. 458 U.S. at 73.

recognized Congress' power to create "adjuncts" to the district courts and to delegate to these adjuncts certain judicial functions.²³ The formation of adjunct tribunals, unlike article I legislative courts, was not perceived by the *Northern Pipeline* plurality as constituting an exception to article III.²⁴ Instead, delegation to an adjunct was found to be "consistent with Art[icle] III, so long as 'the essential attributes of the judicial power' are retained in the Art[icle] III court."²⁵ The Court then drew a distinction between two classes of adjuncts. Congress may empower "class 1 adjuncts"²⁶ to adjudicate specific federally-created rights, for then it "possesses substantial discretion to prescribe the manner in which [such] right[s] may be adjudicated."²⁷ Class 2 adjuncts, however, are created by Congress not for the limited purpose of vindicating specific congressionally created rights, but rather to assist the dis-

²³ 458 U.S. at 77-78. The plurality recognized that article III courts may call on non-article III personnel to aid the court in an advisory capacity in fact-finding and other traditionally judicial functions. *Id.*; see *Crowell v. Benson*, 285 U.S. 22, 51-52 (1932). A federal jury is an example of a constitutionally mandated "adjunct" to the article III courts. 285 U.S. at 51. Courts in admiralty and equity have historically called on the assistance of "assessors" to state an account or compute damages. *Id.* The practice continues today in the use of masters in the federal courts. See FED. R. CIV. P. 53. "In exercising [its] original jurisdiction under Art. III," the Supreme Court regularly appoints masters "who may be either Art. III judges or members of the Bar," to find facts and state conclusions of law. *United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980). While every determination of fact in article III courts need not be made by judges, *Crowell v. Benson*, 285 U.S. 22, 51 (1932), the Supreme Court has not yet ruled on an adjunct scheme that permits the adjuncts to render an ultimate decision, see *Raddatz*, 447 U.S. at 681-82.

²⁴ 458 U.S. at 77 n.29.

²⁵ *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

²⁶ While the *Northern Pipeline* plurality did not use the terms "class 1" or "class 2" adjuncts, this Note has adopted these terms for the sake of convenience and brevity.

²⁷ 458 U.S. at 80. The plurality noted that "use of administrative agencies as adjuncts was first upheld in *Crowell v. Benson*," where appellants had challenged the constitutionality of the United States Employees' Compensation Commission's power to enforce federal statutes that required employers to compensate workers for injuries that occurred on the navigable waters of the United States. 458 U.S. at 78. See *Crowell v. Benson*, 285 U.S. 22, 38 (1932). The agency was empowered to determine the nature and extent of employees' injuries, *id.* at 54, but could not enforce its compensation orders, see *id.* at 44-45. Analogizing the Commission's function to that of an equity assessor, the *Crowell* Court held that the adjunct scheme was consistent with article III. *Id.* at 54.

While both class 1 adjuncts and "public rights" legislative courts are empowered to enforce congressionally created rights, only class 1 adjuncts, such as the Commission in *Crowell*, may resolve disputes involving private rights, those involving "the liability of one individual to another under the law as defined." *Id.* at 51. Since private rights disputes "lie at the core of the historically recognized judicial power," 458 U.S. at 70, non-article III tribunals empowered to resolve such disputes must not be independent of the article III system, but instead must be an extension of the article III court itself, see *id.* at 77 & n.29.

strict courts in a general manner that permeates all areas of substantive law.²⁸ Thus, class 2 adjuncts may assist in the adjudication of constitutional rights.²⁹ Consequently, when Congress creates a class 2 system, it must comply with the *Northern Pipeline* caveat that class 2 adjuncts be "subject to sufficient control by an Art[icle] III district court."³⁰

Thus far, the Magistrates Act is the only class 2 system that has been constitutionally scrutinized by the Supreme Court,³¹ and *Northern Pipeline* and *United States v. Raddatz*³² are the only cases that suggest the permissible extent to which Congress may delegate inherently judicial functions to a class 2 adjunct. Neither *Northern Pipeline* nor *Raddatz*, however, make clear which or how many essential attributes of judicial power must be retained by an article III court to ensure the constitutionality of the class 2 system created by section 636(c).³³ First, *Raddatz* did not address whether Congress "could constitutionally have delegated the task of rendering a final decision" to a class 2 adjunct.³⁴ Second, while *Northern Pipeline* set forth a five-prong test for appraising the degree of retention of the essential article III attributes of judicial power, this test is directed primarily toward class 1 adjuncts.³⁵

²⁸ See, e.g., 28 U.S.C. § 636 (1982); FED. R. CIV. P. 53.

²⁹ 458 U.S. at 78-79; see *United States v. Raddatz*, 447 U.S. 667, 676-77 (1980) (upholding magistrate's power to make findings and recommendations on defendant's motion to suppress evidence involving fifth amendment claim).

³⁰ 458 U.S. at 79. While only class 2 adjuncts must be subject to article III control to the extent approved in *Raddatz*, both classes of adjuncts are subject to the restriction that all or even most of the essential attributes of judicial power may not be withdrawn from the article III court by a statutory scheme. See *id.* at 81. For a discussion of the factors that enter into a finding of "sufficient" article III control, see *infra* text accompanying notes 55-59.

³¹ See *supra* notes 26-30 and accompanying text. While the Court has long approved the use of masters as class 2 adjuncts to article III courts, see, e.g., *Kimberly v. Arms*, 129 U.S. 512, 524 (1889), there are severe restrictions on when they may be used, see *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957); FED. R. CIV. P. 53(b). Masters are therefore not part of an adjunct "system" in the same sense as are magistrates.

³² 447 U.S. 667, 682-83 (1980).

³³ See *Northern Pipeline*, 458 U.S. at 84-86; *Raddatz*, 447 U.S. at 681-83.

³⁴ 447 U.S. at 681.

³⁵ See 458 U.S. at 84-86. Since the plurality exclusively cited *Crowell* in its five-prong enumeration to exemplify the use of class 1 adjuncts, but cited *Raddatz* to demonstrate the contrasting features of class 2 adjuncts, it is suggested that the *Northern Pipeline* five-prong test is intended to apply specifically to a class 1 scheme. See *id.* at 85. Since the primary purpose of the bankruptcy courts was to enforce federal law, the *Northern Pipeline* plurality evidently viewed the Bankruptcy Act as designed to implement a class 1 scheme. See *id.* at 84 & n.36. In this limited portion of the Act, the plurality acknowledged that "[t]he interaction between the Legislative and Judicial Branches is at its height, where

Since the features of a class 2 adjunct system differ from those of a class 1 system,³⁶ it is suggested that the essential attributes of judicial power that must remain with the article III court will also differ in the context of class 2 adjuncts. Therefore, to evaluate section 636(c), it is necessary to examine the reasoning behind the *Northern Pipeline* plurality's five-prong class 1 adjunct test and, taking into consideration the unique features of class 2 adjuncts, fashion a new test specifically tailored to evaluate the constitutionality of the system created by the Magistrates Act.

The five essential attributes enumerated by *Northern Pipeline* for evaluating a class 1 system are: (1) whether the adjunct's jurisdiction extends beyond actions brought to vindicate congressionally created rights; (2) whether the adjunct exercises *all* of the jurisdiction purportedly conferred on the district courts by Congress over a particular area of substantive law; (3) whether the adjunct exercises all ordinary district court powers; (4) whether the adjunct's decisions are subject only to a clearly erroneous standard of review on appeal to an article III court; and (5) whether the adjunct is empowered to enter final and enforceable judgments that are binding in the absence of an appeal.³⁷

It is because class 2 adjuncts may adjudicate constitutional claims that there is a need for statutorily mandated "sufficient" control by an article III court.³⁸ The constitutional theory behind this "sufficiency" concept is that the class 2 adjunct partakes of

courts are adjudicating rights wholly of Congress' creation." *Id.* at 83 n.35. However, that portion of the Act that permitted appellant *Northern* to bring contract and misrepresentation claims against *Marathon* in a bankruptcy court, *see* 28 U.S.C. § 1471(b) (1982), involved *state* created rights, where Congress' authority to prescribe the manner of adjudication "plainly must be deemed at a minimum," since "Congress has not purported to prescribe a rule of decision for the resolution of [state-law] claims." 458 U.S. at 84 & n.36. Thus, even if the plurality had analyzed the Bankruptcy Act as establishing a class 2 scheme, the Court would have reached the same result, since bankruptcy judges were clearly not subject to "sufficient" article III control. *See id.* at 80 n.31, 86.

³⁶ *See supra* notes 26-30 and accompanying text. The greatest difference between class 1 and class 2 adjuncts for purposes of constitutional analysis is the degree of scrutiny applied in the evaluation of each. *See* 458 U.S. at 82-83. While class 1 adjunct systems are evaluated according to a rational basis test, class 2 schemes are subject to strict scrutiny. *See id.* ("the Court's scrutiny of the adjunct scheme in *Raddatz*—which played a role in the adjudication of constitutional rights—was far stricter than it had been in *Crowell*").

³⁷ 458 U.S. at 85-86. The plurality found that all five of these essential attributes expressed in *Northern Pipeline* were absent from the Bankruptcy Act. *Id.* The Court concluded that the "adjunct" label affixed by Congress was a mere facade, behind which bankruptcy judges exercised *de facto* article III powers. *See id.* at 86.

³⁸ *Id.* at 78-79; *see Raddatz*, 447 U.S. at 685 (Blackmun, J., concurring).

the article III impartiality of the federal judiciary through an "umbilical" relationship with the district court and, thereby, is insulated by the article III judges from improper influences from the coordinate branches.³⁹ The presence of sufficient article III control would allay Hamiltonian fears of both "improper [judicial] complaisance" to the executive or legislative branches, and the natural tendency to follow popular opinion rather than the Constitution and the laws.⁴⁰ Such dangers are less apparent in the class 1 arena, since the class 1 adjunct has been created specifically to carry out the will of Congress.⁴¹

In addition, the need for control by an article III court derives from the differing jurisdictional theories underlying the creation of class 1 and class 2 adjuncts. While class 1 adjuncts receive specific grants of subject-matter jurisdiction from Congress for the purpose of enforcing specific statutes, the class 2 adjunct's subject-matter jurisdiction flows from the umbilical relationship with the district court.⁴² A class 2 adjunct, therefore, may hear any case for which there is federal jurisdiction pursuant to other provisions of the United States Code.⁴³ Consequently, the jurisdictional problem raised by the class 2 system properly can be termed one of "forum jurisdiction," since the controversy does not involve what cases may be heard in federal tribunals, but rather by whom they may be heard.⁴⁴

These dissimilarities between class 1 and class 2 adjuncts give rise to systemic distinctions that affect the application of the five-prong *Northern Pipeline* test to a class 2 system.⁴⁵ The first prong, which in effect bars the conferral of ancillary or pendent jurisdiction upon a class 1 adjunct,⁴⁶ would have no effect on a class 2

³⁹ See *Raddatz*, 447 U.S. at 685 (Blackmun, J., concurring). Justice Blackmun stated that "the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than from without, the judicial department." *Id.* (Blackmun, J., concurring).

⁴⁰ See THE FEDERALIST No. 78, at 529 (A. Hamilton) (J. Cooke ed. 1961).

⁴¹ See 458 U.S. at 83 n.35; *supra* note 27 and accompanying text.

⁴² See, e.g., *Muhich v. Allen*, 603 F.2d 1247, 1251 (7th Cir. 1979) ("jurisdiction remains vested in the district court and is merely exercised through the medium of the magistrate").

⁴³ See *Pacemaker II*, 725 F.2d at 543; *Wharton-Thomas*, 721 F.2d at 926.

⁴⁴ See *Wharton-Thomas*, 721 F.2d at 926.

⁴⁵ See *Northern Pipeline*, 458 U.S. at 85-86; *infra* notes 49-59 and accompanying text.

⁴⁶ See 458 U.S. at 85. The plurality distinguished the adjunct scheme upheld in *Crowell v. Benson*, 285 U.S. 22 (1932), in which the agency was confined to making particular types of factual determinations in a narrow area of substantive law, from the jurisdictional grant to the bankruptcy courts in 28 U.S.C. § 1471(b) (1982), that permits a non-article III tribu-

adjunct, who is by definition potentially empowered to hear any case over which the district courts may validly exercise jurisdiction.⁴⁷ The second prong, which essentially prohibits Congress from granting exclusive jurisdiction to a class 1 adjunct, is similarly inapposite when applied to a class 2 adjunct, because a class 2 adjunct's forum jurisdiction is wholly dependent upon the will of the district judge.⁴⁸ Moreover, conditions precedent to the adjunct's exercise of decisionmaking power, such as litigant consent and district court designation, would appear to provide the same limiting force upon the adjunct's forum jurisdiction in the class 2 arena that limitations on subject-matter jurisdiction provide in the class 1 arena.⁴⁹

The fourth and fifth prongs of the *Northern Pipeline* Court's class 1 adjunct test, which address standard of review⁵⁰ and power to issue a final judgment,⁵¹ appear to remain essential elements of judicial power when transposed into the class 2 arena.⁵² It is submitted, however, that the third prong, which addresses a class 1 adjunct's exercise of ordinary district court powers, is subsumed under the fifth prong when applied to class 2 adjuncts, since the district judge is free to withhold special designation to exercise such powers in a class 2 setting.⁵³

nal to decide pendent state claims raised by the petitioner in a reorganization proceeding as well as ancillary claims raised by the defendants to such actions. See 458 U.S. at 85; 28 U.S.C. § 1471(b); *supra* note 8.

⁴⁷ See *supra* notes 42-43 and accompanying text.

⁴⁸ See *supra* note 42 and accompanying text.

⁴⁹ See *Collins v. Foreman*, 729 F.2d 108, 119 (2d Cir. 1984) ("the consent provision of section 636(c) provides a constraint against the wholesale delegation of judicial power to adjuncts of the district court"). It is submitted that a prerequisite of litigant consent within a class 2 statutory scheme can be considered the equivalent of a provision in a class 1 scheme withholding exclusive jurisdiction, as well as ancillary and pendent jurisdiction, from the class 1 adjunct.

⁵⁰ See 458 U.S. at 85. While agency orders in *Crowell v. Benson* were to be set aside if "not supported by the evidence," decisions by bankruptcy judges were subject to only a "clearly erroneous" standard of review. *Id.*; see RULES BANKR. P. 810.

⁵¹ See 458 U.S. at 85-86. The plurality noted that the agency in *Crowell v. Benson* was "required by law to seek enforcement of its compensation orders in the district court." *Id.* at 85.

⁵² See, e.g., *Raddatz*, 447 U.S. at 681-82 (standard of review and decisionmaking power elements of statutory scheme essential to upholding constitutionality of class 2 adjunct system embodied in § 636(b)); *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976) (same).

⁵³ See 28 U.S.C. § 636(c)(1) (1982); *supra* note 3. In a class 1 scheme, Congress directly mandates that the adjunct be empowered to exercise traditional district court functions. See 28 U.S.C. § 1481 (1982). If the class 1 adjunct is also empowered to exercise ancillary and exclusive jurisdiction, Congress' additional failure to satisfy the third prong would "suggest

Finally, the *Northern Pipeline* holding demands an added consideration when evaluating the constitutionality of class 2 adjuncts: The adjunct must be subject to "sufficient" article III control.⁵⁴ Statutory provisions that promote an umbilical relationship between the class 2 adjunct and the district court—special district court designation of an adjunct to perform traditional decision-making functions,⁵⁵ judicial appointment and removal,⁵⁶ article III merit selection panels,⁵⁷ and district court power to vacate a reference⁵⁸—reflect the degree of article III control under the Magistrates Act.

This Note proposes that consideration of the following four factors will aid in determining whether the essential attributes of judicial power are retained by a district court implementing a class 2 scheme: (1) whether the adjunct is empowered to issue an ultimate judgment; (2) whether the judgment may be issued only upon consent of the parties; (3) what standard of review governs appeals to an article III court; and (4) whether the adjunct possesses an umbilical relationship to the district court by which he is subject to "sufficient" article III control.

In order properly to apply these four factors to an evaluation of a class 2 scheme, it is important to consider that the *Northern Pipeline* plurality never contended that the system necessarily must be struck down if an adjunct exercises any one of the essential attributes.⁵⁹ Instead, *Northern Pipeline* held that Congress, by

[an] unwarranted [encroachment] upon the judicial power of the United States." *Northern Pipeline*, 458 U.S. at 84. However, when "third-prong" powers are conferred upon a class 2 adjunct, Congress is permitting such powers to be granted to a non-article III officer. See 28 U.S.C. § 636(c)(1) (1982). The danger of unwarranted congressional encroachment is reduced through the intervening presence of the district judge. See *Collins v. Foreman*, 729 F.2d 108, 118 (2d Cir. 1984) (special designation procedures in § 636(c) contribute to preserving constitutional balance of power between Congress and district courts).

⁵⁴ See 458 U.S. at 78-79; *supra* notes 30, 38-40 and accompanying text.

⁵⁵ See 28 U.S.C. § 636(c)(1) (1982).

⁵⁶ See *id.* § 631.

⁵⁷ See *Hearings on S.237 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., App. B (1979). Under the new selection criteria, "[a] district court may include additional qualification standards appropriate for a particular magistrate's position." *Id.*, Standards for Selection of Magistrates, § (E) II.

⁵⁸ See 28 U.S.C. § 636(c)(6) (1982) (district court may "for good cause" or "under extraordinary circumstances" by motion of a party, vacate a reference to a magistrate).

⁵⁹ See 458 U.S. at 84-85 (Bankruptcy Act unconstitutional because it "vests all 'essential attributes' of the judicial power of the United States in the 'adjunct' bankruptcy court") (emphasis added); *id.* at 77 n.29 (Congress may assign some adjudicatory functions to an adjunct).

removing five essential ingredients of judicial power from the district courts, and placing all five into the hands of a single non-article III adjunct, had created a scheme that violated article III.⁶⁰ Notwithstanding that the Court has consistently held that retention of ultimate decisionmaking power by an article III court is the single most essential attribute of judicial power in a class 2 context,⁶¹ it is suggested that the *Northern Pipeline* court intentionally did not resolve whether that power may be delegated if the other essential attributes are retained by an article III court. Therefore, a class 2 scheme need not be struck down mechanically because the adjunct may render ultimate decisions.⁶² Rather, the class 2 adjunct test proposed by this Note should be applied in a contingent fashion. Thus, if the adjunct does not render the ultimate decision, consideration of litigant consent and standard of review should be obviated.⁶³ However, if the class 2 scheme does empower the adjunct to enter the ultimate judgment, it is submitted that there must be litigant consent, the judgment must not be reviewed under a "clearly erroneous" standard, and the adjunct must be subject to sufficient article III control.⁶⁴

Upholding the Constitutionality of the Magistrates Act

The reasoning employed by the three circuit courts in upholding the constitutionality of section 636(c) has failed to confront the

⁶⁰ See *id.* at 84-85.

⁶¹ See *Raddatz*, 447 U.S. at 683 (delegation under § 636(b) "does not violate Art. III so long as the ultimate decision is made by the district court"); *Mathews v. Weber*, 423 U.S. 261, 271 (1976) (magistrate may preliminarily review a district court's entire social security docket since the final decision remains with the judge).

⁶² See *Collins v. Foreman*, 729 F.2d 108, 114 (2d Cir. 1984).

⁶³ See 28 U.S.C. § 636(b)(1)(A) (1982); FED. R. Crv. P. 53(b). Pursuant to § 636(b)(1)(A), a judge may refer any non-dispositive pretrial motion to a magistrate for final determination. See 28 U.S.C. § 636(b)(1)(A) (1982). Such findings are subject to review only "where it has been shown that the magistrate's order is clearly erroneous or contrary to law." *Id.* Since the magistrate is not rendering the ultimate decision in the case, consent of the parties is not required, and a clearly erroneous standard of review is sufficient. See *supra* note 2. Similarly, under FED. R. Crv. P. 53(b), a judge may refer any fact-finding or non-dispositive pretrial matter to a special master without consent of the parties. *Id.*; see *supra* notes 23, 31. The findings of the master are subject to a clearly erroneous standard of review in the district court. FED. R. Crv. P. 53(e)(2). Therefore, it would appear that unless an adjunct renders an ultimate decision, the requirements of litigant consent and *de novo* review are largely irrelevant to a constitutional analysis. See *Collins v. Foreman*, 729 F.2d 108, 116 (2d Cir. 1984).

⁶⁴ See *supra* notes 46-55 and accompanying text.

adjunct requirements set forth in *Northern Pipeline*.⁶⁵ In concluding that "*Northern Pipeline's* ban against non-Article III tribunals . . . does not apply [to the Magistrates Act],"⁶⁶ all three circuits pointed to the same four features of the statute: (1) consensual reference; (2) district court appointment and special trial designation of magistrates; (3) district court power to vacate a reference; and (4) the right to appeal to an article III court.⁶⁷ It is submitted, however, that the presence of these four elements, standing alone, does not ensure that the essential attributes of judicial power will remain vested in the district courts. The prerequisite of litigant consent under section 636(c) clearly satisfies the second prong of the class 2 adjunct test proposed by this Note.⁶⁸ However, the provisions for judicial appointment and district court trial designation of magistrates, as well as the provision that enables a district judge to vacate a reference to a magistrate, are all merely sub-elements of the requirement of sufficient article III control.⁶⁹ Finally, although the *Northern Pipeline* court clearly indicated that the availability of ordinary appellate review is insufficient to "satisfy either the command or the purpose of Art[icle] III,"⁷⁰ the *Wharton-Thomas*, *Pacemaker II*, and *Collins* courts apparently agree that such review is sufficient to dispel *Northern Pipeline's* article III restrictions.⁷¹

Since ordinary appellate review involves the application of the

⁶⁵ See *supra* text accompanying note 37.

⁶⁶ *Wharton-Thomas v. United States*, 721 F.2d 922, 930 (3d Cir. 1983).

⁶⁷ See *Collins v. Foreman*, 729 F.2d 108, 115 (2d Cir. 1984); *Pacemaker II*, 725 F.2d at 544-46; *Wharton-Thomas v. United States*, 721 F.2d 922, 930 (3d Cir. 1983).

⁶⁸ See 28 U.S.C. § 636(c)(1) (1982); *supra* note 49 and accompanying text.

⁶⁹ See 28 U.S.C. §§ 631, 636(c)(1), (c)(6) (1982); *supra* notes 55-59 and accompanying text. In determining the degree of article III control preserved by the Bankruptcy Act, the *Northern Pipeline* plurality noted the absence of provisions for judicial appointment and removal, and district court power to vacate a reference. 458 U.S. at 79 n.31; see *United States v. Raddatz*, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring). The provision in § 636(c)(1) for special trial designation of magistrates, while not addressed by the *Northern Pipeline* Court, would undoubtedly be categorized with these other provisions ensuring article III control over class 2 adjuncts. 28 U.S.C. § 636(c)(1) (1982).

⁷⁰ 458 U.S. at 74 n.28. The *Northern Pipeline* plurality rejected Justice White's contention that the right of appeal to an article III court validates the Bankruptcy Act. *Id.* The plurality also rejected appellant Northern's contention that "*Crowell* and *Raddatz* stand for the proposition that Art[icle] III is satisfied so long as some degree of appellate review is provided," maintaining instead that "[o]ur precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication." *Id.* at 86 n.39; see also *Pacemaker I*, 712 F.2d at 1313.

⁷¹ See *Collins*, 729 F.2d at 117; *Pacemaker II*, 725 F.2d at 545; *Wharton-Thomas*, 721 F.2d at 930 (footnote omitted).

clearly erroneous standard,⁷² this assertion by the circuit courts appears to contravene the standard of review consideration of the class 2 adjunct test.⁷³ In point of fact, section 636(c) does not specify the standard of review to be applied by the reviewing court.⁷⁴ It simply provides that the court may affirm, reverse, or modify all or part of the magistrate's ruling.⁷⁵ Though application of the clearly erroneous standard can be justified by the statute, which is couched in language that arguably implies a deferential standard of review, this standard is mandated neither by the statute itself nor by its legislative history.⁷⁶ Admittedly, the perimeters of the

⁷² See FED. R. CIV. P. 52(a).

⁷³ See *supra* notes 51, 53 and accompanying text; *cf.* 1616 Reminc Ltd. Partnership v. Atchison & Keller Co., 704 F.2d 1313, 1318 (4th Cir. 1983) (Bankruptcy Rule 810 unconstitutional because it prescribes a clearly erroneous standard of review barred by *Northern Pipeline*). All three circuits, more or less explicitly, have construed § 636(c) as mandating a clearly erroneous standard of review. See *Collins*, 729 F.2d at 117 (§ 636(c)(3)-(4) indicate a specific authorization from Congress to use clearly erroneous standards); *Wharton-Thomas*, 721 F.2d at 930 ("The scope of review is whether the factual findings are clearly erroneous"); *cf. Pacemaker II*, 725 F.2d at 546 (discussing advantages of review provision of § 636(c) in comparison with *de novo* review provision of § 636(b)(1)(B)).

Since magistrates are empowered to issue final judgments, the class 2 adjunct test requires that all three remaining prongs be satisfied in order to ensure the constitutionality of § 636(c). However, the four-factor enumeration promulgated by the circuit courts satisfies only two of these prongs. Therefore, as construed by these circuits, § 636(c) does not ensure the retention of the essential attributes of judicial power within the article III courts. See *supra* text accompanying note 65.

⁷⁴ See 28 U.S.C. § 636(c)(3)-(5) (1982). Section 636(c)(3) provides in part:

(3) Upon entry of judgment . . . an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate . . . to direct the entry of judgment of the district court in accordance with the Federal Rules of Civil Procedure.

Id.; see also *id.* § 636(c)(4) ("parties may further consent to appeal [to district judge] in the same manner as on an appeal from a judgment of the district court to a court of appeals").

⁷⁵ See *id.* § 636(c)(4).

⁷⁶ See *id.*; S. REP. NO. 74, 96th Cong., 1st Sess. 5, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 1469, 1473-74; H.R. REP. NO. 287, 96th Cong., 1st Sess. 7-9 (1979). The ambiguous reference of § 636(c)(4) to "the same manner as an appeal" from a district court to a court of appeals does not necessarily include the same standard of review specified in Rule 52(a). See FED. R. CIV. P. 52(a). Since the congressional reports are silent on standard of review, the statutory reference could merely encompass standard filing procedures. This ambiguity was observed by the Advisory Committee in its note to the recent amendments to Rule 74 of the Federal Rules of Civil Procedure, which implements the review provisions of § 636(c)(4). See FED. R. CIV. P. 74 Advisory Committee note. The Advisory Committee noted that "[p]resumably Congress intended that the district court follow the same general procedures, including the 'clearly erroneous' factual review standard of Civil Rule 52(a), that a court of appeals follows in reviewing a judgment of the district court." *Id.* (emphasis added). It is suggested that the Committee's use of the word "presumably" not only acknowledges the

standard of review doctrine in the arena of class 2 adjuncts have been as yet only roughly drawn by the Supreme Court.⁷⁷ Since both section 1471 of the Bankruptcy Act and section 636(b)(1)(B) of the Magistrates Act are non-consensual, neither *Northern Pipeline* nor *Raddatz* shed light on the effect of consent on the permissible standard of review.⁷⁸ Therefore, the lower federal courts theoretically are free to determine that the provision for consent under section 636(c) permits the application of a clearly erroneous standard.⁷⁹ It is submitted, however, that while litigant consent may eliminate the need for *de novo* review, both substantive and structural constitutional concerns militate against article III courts applying merely a clearly erroneous standard when reviewing the decision of a non-article III adjunct.

The Supreme Court has indicated that, with respect to sub-

absence of legislative history on the subject, but also suggests a hesitance to infer such a standard absent a clear directive from Congress. Nevertheless, the *Collins* court believed that the language of § 636(c)(4) and (5) indicated that "Congress has specifically authorized" a clearly erroneous standard of review. *Collins v. Foreman*, 729 F.2d 108, 118 (2d Cir. 1984).

⁷⁷ See *infra* note 79 and accompanying text.

⁷⁸ *Wharton-Thomas v. United States*, 721 F.2d 922, 928 (3d Cir. 1983); see *Pacemaker II*, 725 F.2d at 540; cf. *Collins v. Foreman*, 729 F.2d 108, 116 (2d Cir. 1984) (all appellee need show "is that the delegation is constitutional when the parties consent to the reference"). *Raddatz* dealt with the constitutionality of § 636(b)(1)(B), which authorizes a district court to refer to a magistrate a motion for an evidentiary hearing in a criminal case. See *Raddatz*, 447 U.S. at 669; 28 U.S.C. § 636(b)(1) (1982). Under such a referral, the district judge decides the motion based on the record developed before the magistrate, including the magistrate's proposed findings and recommendations. 28 U.S.C. § 636(b)(1) (1982). The district judge must make a "*de novo* determination" of those portions of the record to which either party objects and may "accept, reject, or modify, in whole or in part," the magistrate's findings. *Id.* The *Raddatz* Court held that the district judge is not required to engage in a *de novo* hearing; rather, he must only make an independent determination on the basis of the written record. 447 U.S. at 674-75. While *Raddatz* held that article III demands were satisfied by the provision, *id.* at 680, it did not address the delegation question posed by § 636(c). See *Collins v. Foreman*, 729 F.2d 108, 116 (2d Cir. 1984); *Pacemaker II*, 725 F.2d at 546; see also *Wharton-Thomas*, 721 F.2d at 928 (*Raddatz* not determinative when there is a consensual reference).

⁷⁹ Cf. FED. R. CIV. P. 72 Advisory Committee note. The committee stated that when, under § 636(b)(1)(B), a magistrate submits findings and recommendations on a dispositive pretrial motion or prisoner petition, and "no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Id.* (citation omitted). The fact that post-trial consent of the parties can transform what would ordinarily be a *de novo* standard of review into a clearly erroneous standard lends some support to the contention of the *Collins* court that the presence of pretrial consent to delegation will permit the application of the clearly erroneous standard. See *Collins v. Foreman*, 729 F.2d 108, 119 (2d Cir. 1984) ("a different standard of review when the reference is consensual") (citing Federal Rule of Civil Procedure 53(e)). But see *infra* notes 87-92 and accompanying text.

stantive constitutional rights, non-article III fact-finding should be subject to a more stringent standard of review than a record formed by an article III district judge.⁸⁰ Indeed, adequate protection of constitutional rights often hinges on findings of fact shaped at the trial level.⁸¹ The issue of who may exercise the judicial power of the United States must therefore extend equally to questions of fact and law, since an appellate court may consider only those questions of law that flow from the factual record formed by the trial court.⁸² The trial judge in effect "controls" the appellate court in the latter's review of the trial court's conclusions of law when its findings are reviewed under a clearly erroneous standard.⁸³ Thus, in approving review of a magistrate's decisions under a clearly erroneous standard, it is suggested that the *Wharton-Thomas*, *Pacemaker II*, and *Collins* courts effectively are permitting non-article III magistrates to control review of constitutional questions of law in an article III court. This result undermines the fourth prong of the class 2 adjunct test mandating sufficient article III control,⁸⁴ and violates the notion that rights created by the Constitution are to be secured by judges protected by the tenure and salary provisions of article III.⁸⁵

While a clearly erroneous standard of review may be tenable in isolated instances, including certain cases where constitutional rights are implicated, the validity of an adjunct scheme rests upon broader considerations than a single delegation of decisionmaking power by an article III judge to an adjunct.⁸⁶ When the *Northern*

⁸⁰ See *Crowell v. Benson*, 285 U.S. 22, 64 (1932) (distinguishing between appropriate standards of review in cases of congressionally created and constitutional rights); see also *Agosto v. INS*, 436 U.S. 748, 753 (1978).

⁸¹ See *Crowell v. Benson*, 285 U.S. 22, 57 (1932); cf. *Northern Pipeline*, 458 U.S. at 86 n.39 (Framers intended article III judicial independence to be applied to less "glamorous" common law and statutory matters as well as constitutional rights).

⁸² See 458 U.S. at 86 n.39; *United States v. Raddatz*, 447 U.S. 667, 707 (1980) (Marshall, J., dissenting); *Crowell v. Benson*, 285 U.S. 22, 60 (1932).

⁸³ Cf. *Crowell v. Benson*, 285 U.S. 22, 56 (1932) (*de novo* review may not be "simply the question of due process in relation to notice and hearing," but "rather a question of the appropriate maintenance of the Federal judicial power"); *id.* at 87 (Brandeis, J., dissenting) ("under certain circumstances, the constitutional requirement of due process is a requirement of [article III] judicial process").

⁸⁴ See *supra* notes 38-41, 55-59 and accompanying text.

⁸⁵ See *Northern Pipeline*, 458 U.S. at 81-83.

⁸⁶ See Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1024 (1979). It has been suggested that consensual reference and internal delegation of judicial power pose grave long-term dangers to the structure of the district courts and the policies underlying article III. *Id.*

Pipeline Court struck down the Bankruptcy Act because it "carrie[d] the possibility of . . . an unwarranted encroachment" upon the judicial power, it was evaluating the statute in light of potential future abuses that would eventually undermine the article-III-mandated structure of the federal judiciary.⁸⁷ While there are dicta in both *Pacemaker II*⁸⁸ and *Wharton-Thomas*⁸⁹ that recognize the scope of the structural article III concerns raised in *Northern Pipeline*, the Ninth Circuit dismissed these concerns, holding that "[a]t this stage in the evolution of the magistrate system . . . [we think] there are adequate protections in the statute so that it is not invalid on its face or as applied in the present structure of the judicial system."⁹⁰ Such a statement, it is submitted, misconceives the long-range structural approach adopted by the *Northern Pipeline* plurality.

Determining the proper standard of review in the context of class 2 adjuncts thus implicates both immediate substantive concerns as well as long-term structural considerations.⁹¹ While this

⁸⁷ See 458 U.S. at 84.

⁸⁸ See *Pacemaker II*, 725 F.2d at 544, 546; *infra* notes 91, 105, 106 and accompanying text.

⁸⁹ 721 F.2d at 930. The *Wharton-Thomas* court conceded the systemic threats posed by § 636(c):

We do not deny that there may be basis for concern about the wisdom of large scale delegation of adjudication to magistrates. Wholesale reference of cases even by consent does pose dangers to the district courts as now organized. As the practice continues and becomes more widespread, it will tend to become routine. . . . The possibility of large scale dilutions of district courts to the point where magistrates would outnumber district judges is not inconceivable.

Id. Despite this recognition, the Third Circuit reviewed the magistrates' fact-finding under a clearly erroneous standard. See *id.*

⁹⁰ *Pacemaker II*, 725 F.2d at 546. The *Collins* court upheld the delegation system of § 636(c) by relying primarily on an analogy to masters. *Collins v. Foreman*, 729 F.2d 108, 118 (2d Cir. 1984). While conceding this analogy is imperfect, the court concluded that such imperfections were cured by the provision of § 636(c) for litigant consent. *Id.* at 119. However, the court failed to resolve the further distinction between masters and magistrates, namely, that the former are not intended to "reform the first echelon of the federal judiciary." See *supra* note 2. The *Collins* court's assertion that Congress viewed overcrowded federal dockets as fulfilling the "exceptional circumstances" requirement of Federal Rule of Civil Procedure 53(b), *Collins*, 729 F.2d at 118, still fails to address the larger structural implications of the nationwide scope of § 636(c), see *Pacemaker II*, 725 F.2d at 548 (Schroeder, J., dissenting). In his dissent from the *Pacemaker II* decision, Judge Schroeder noted that "[t]he Act creates mutations in our system of government that transcend its effects on individual litigants." *Id.* (Schroeder, J., dissenting).

⁹¹ See *supra* notes 81-91 and accompanying text; *infra* notes 105-106 and accompanying text. The *Pacemaker II* court observed that the doctrine of separation of powers may have both an individual component as well as a structural component. *Pacemaker II*, 725 F.2d at 541; see *supra* note 15. Thus, if under the first component a party may, by consent,

Note does not advocate striking down the magistrate trial system, it is suggested that a judicial narrowing of section 636(c) to adopt a less deferential standard of review will help ensure the constitutional application of the statute. While courts construing section 636(c) have not considered the question, recent bankruptcy cases applying the Emergency Rule⁹² may provide some guidance in de-

waive his right to have the fact-finding process at a federal trial controlled by an article III judge, a fortiori, he may also consent to have his case reviewed under a clearly erroneous standard. *Cf. Pacemaker II*, 725 F.2d at 541 (to the extent that the doctrine of separation of powers in article III is personal to the parties, it may be waived). However, it is submitted that the court failed to consider the effect of the second component upon consent to a clearly erroneous standard. When an adjunct is empowered to render a binding and enforceable final judgment, the purpose of the appeal is to ensure the preservation of article III control. *See Crowell v. Benson*, 285 U.S. 22, 56-57 (1932). To permit a clearly erroneous standard in such an instance, it is submitted, would tip the balance of control existing between the adjunct and the district court clearly in favor of the adjunct, thereby severing the umbilical relationship between the two, and would, in turn, permit the incursion of pressures and influences from the coordinate branches. *See Pacemaker II*, 725 F.2d at 549 (Schroeder, J., dissenting).

⁹² *See* [1981-1982 Transfer Binder] BANKR. L. REP. (CCH) ¶ 68, 908 (effective December 25, 1982). The *Northern Pipeline* Court, recognizing that its decision would work substantial hardship on relying litigants, held that the decision would apply prospectively and stayed the effect of its judgment until October 4, 1982, in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 458 U.S. at 88. When Congress failed to enact remedial legislation during the allotted time period, the Court once again stayed its judgment until December 24, 1982. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, ____ U.S. ____, 103 S. Ct. 199 (1982). Meanwhile, anticipating that Congress might fail to act during the stay period, the Judicial Conference distributed a proposed rule to all bankruptcy, district and appeals court judges. Judicial Conference Resolution (Sept. 23, 1982); *see White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 256 (6th Cir. 1983). With only minor modification, each circuit council ordered the district courts within its circuit to adopt the rule. *Id.* When the Supreme Court refused to grant another stay, the proposed rule, known as the Bankruptcy Emergency Model Local Rule (Emergency Rule), went into effect in each of the 11 judicial circuits. Administrative Order No. 28 (effective December 25, 1982). Under the Emergency Rule, the bankruptcy judge may enter judgments in "core proceedings," that is, in those cases arising under or in Title 11. Emergency Rule § (c)(1). In "related" proceedings, that is, civil proceedings arising independently of the related claim in bankruptcy, the bankruptcy judge is permitted only to submit findings and conclusions to the district judge. *Id.* Significantly, however, the Emergency Rule permits the parties to consent to the entry of judgment in related proceedings by the bankruptcy judge. *Id.* § (d)(3)(B).

The Emergency Rule has been widely attacked as unconstitutional by a host of courts and commentators. *See, e.g., In re South Portland Shipyard & Marine Rys.*, 10 BANKR. CT. DEC. 1012, 1016-17 (Bankr. D. Me. 1983); *In re Seven Springs Apartments*, 10 BANKR. CT. DEC. 634, 655-64 (Bankr. N.D. Ga. 1983); Countryman, *Emergency Rule Compounds Emergency*, 57 BANKR. L.J. 1, 9-12 (1983); Norton & Lieb, *The Aftermath of Northern Pipeline: Bankruptcy Jurisdiction under Local Court Rule*, reprinted in NORTON BANKRUPTCY LAW AND PRACTICE (Supp. 1983). *But see White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 263-64 (6th Cir. 1983) (upholding validity of Emergency Rule); *Moody v. Martin*, 27 Bankr. Rep.

termining a constitutionally appropriate standard of review to be applied in appeals from magistrates' decisions.⁹³ For example, in *In re AOV Industries, Inc.*,⁹⁴ the District Court for the District of Columbia reviewed the decision of a bankruptcy judge under a provision of the Emergency Rule analogous to section 636(c)⁹⁵ and

991, 1000 (W.D. Wis. 1983) (Rule conforms to standards enumerated in *Northern Pipeline*). The Supreme Court has not passed on the validity of the Emergency Rule. *See, e.g., American Airlines Inc. v. Braniff Airways, Inc.*, 700 F.2d 214, 215 (5th Cir.), *cert. denied*, 103 S. Ct. 2122 (1983); *In re Int'l Harvester Co.*, No. 82-1385, slip op. (N.D. Ill.), *mand. denied*, 103 S.Ct. 1804 (1983).

⁹³ *See, e.g., In re Comer*, 716 F.2d 168, 174-75 (3d Cir. 1983) (adopting clearly erroneous standard); *Kalaris v. Donovan*, 697 F.2d 376, 386-87 (D.C. Cir.) (applying substantial evidence test), *cert. denied*, 103 S. Ct. 3088 (1983); *Moody v. Martin*, 27 Bankr. Rep. 991, 1000 (W.D. Wis. 1983) (requiring *de novo* review). The precedential value of bankruptcy cases considering the appropriate standard of review is limited by the rapid changes occurring in the field of bankruptcy court jurisdiction, particularly following the August 1, 1983 promulgation of the new Bankruptcy Rules. Bankruptcy Rule 8013 states that "[f]indings of fact [of the bankruptcy court] shall not be set aside [on appeal] unless clearly erroneous." Bankruptcy Rule 8013. While the Emergency Rule appears to create a *de novo* review standard, § (g) of the Emergency Rule states that "[c]ourts of bankruptcy and procedure in bankruptcy shall continue to be governed by . . . the bankruptcy rules prescribed by the Supreme Court of the United States." Emergency Rule § (g). Bankruptcy Rule 8013 was promulgated by the Supreme Court; therefore, the Emergency Rule appears to prescribe two different review standards.

Considering the conflict between what appears to be a *de novo* standard of review under the Emergency Rule and the clearly erroneous standard prescribed by Rule 8013, the Court of Appeals for the Third Circuit concluded in *Morissey v. Arnold*, 717 F.2d 100 (3d Cir. 1983), that the conflict must be resolved in favor of the clearly erroneous standard, since Rule 8013 was promulgated pursuant to statutory authority, *see* 28 U.S.C. § 2075 (1982), and the Emergency Rule states that it is to be construed as subordinate to any rules that may be so promulgated, Emergency Rule § (g). *Morissey*, 717 F.2d at 104. The *Morissey* court further reasoned that while the new rules allow district courts to promulgate rules such as the Emergency Rule, "such local rules are clearly subordinate to, and may not be inconsistent with, the national rules." *Id.* For decisions in accord with the *Morissey* court's resolution of the conflict between the Emergency Rule and the new Bankruptcy Rules, *see In re Comer*, 716 F.2d at 175; *In re Brown*, 32 Bankr. Rep. 590, 592 (Bankr. N.D. Ga. 1983).

It is submitted that the cases supporting a clearly erroneous standard of review from the findings and recommendations or judgments of non-article III officers are not as helpful to a constitutional analysis as they might be, because the decisions rest on the statutory supremacy of the Supreme Court-promulgated rules, rather than on an objective assessment of the constitutional issues involved. *But cf. Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946) (considering challenge to validity of Supreme Court-promulgated Rule 4(f) of the Federal Rules of Civil Procedure); 1616 *Reminc Ltd. Partnership v. Atchison & Keller Co.*, 704 F.2d 1313, 1318 (4th Cir. 1983) (striking down Supreme Court-promulgated Bankruptcy Rule 810 because it prescribes a clearly erroneous standard of review and thus "unconstitutionally vest[s] the non-article III bankruptcy referee with too great a measure of the judicial power of the United States").

⁹⁴ 31 Bankr. Rep. 1005 (D.D.C. 1983).

⁹⁵ *Id.* at 1008; *see* Emergency Rule § (e)(2)(B). Subsection (e)(2)(B) provides:

In conducting review, the district judge may hold a hearing and may receive

recognized that an appellate court has discretion to apply the standard of review it considers appropriate.⁹⁶ Rejecting the adoption of the deferential "clearly erroneous" standard, the court held that the "substantial evidence" standard—relatively strict—was appropriate.⁹⁷ The court noted that while *Northern Pipeline* forbade a clearly erroneous standard, it would be inappropriate to imply *de novo* review absent a clear congressional directive.⁹⁸ It is submitted that use of the substantial evidence test would be equally effica-

such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

Id. While the Emergency Rule on its face also appears to be similar to § 636(b)(1)(B) of the Magistrates Act due to the provision for *de novo* review, § 636(b)(1)(B) states that the reviewing court "shall make a *de novo* determination" of contested portions of the record. See 28 U.S.C. § 636(b)(1) (1982) (emphasis added). The Emergency Rule, by contrast, *permits* a *de novo* hearing, leaving the decision concerning the standard of review to be decided entirely within the discretion of the reviewing judge. Emergency Rule § (e)(2)(B). While it is true that under both the Emergency Rule and § 636(b)(1) the "district judge is not bound to give any particular weight" to the findings of the adjunct, *In re Rivers*, 19 Bankr. Rep. 438, 454 (Bankr. E.D. Tenn. 1982), *rev'd*, 714 F.2d 142 (6th Cir. 1983), it is suggested that under the Emergency Rule, a district court could promulgate a local rule requiring use of the "clearly erroneous" standard. Such a local rule would not be inconsistent with the Emergency Rule, since the latter is couched in discretionary language, whereas, in the context of the Magistrates Act, a similar local rule would conflict with the language of § 636(b)(1) mandating a *de novo* determination. 28 U.S.C. § 636(b)(1) (1982).

Section 636(c) does not *prohibit* a reviewing judge from engaging in a *de novo* determination of the magistrate's judgment; it simply does not address the standard of review to be applied. See 28 U.S.C. § 636(c)(4) (1982). Section 636(c) and the Emergency Rule, therefore, are similar in that neither requires nor prohibits any particular standard of review, and therefore each may be used as a "testing ground" for determining a constitutionally appropriate standard of review in the adjunct arena. Cf. FED. R. Civ. P. 74 advisory committee note.

⁹⁶ *In re AOV Indus.*, 31 Bankr. Rep. 1005, 1008 (D.D.C. 1983). The district court noted that the reviewing court could "accord great deference to the findings and conclusions of the Bankruptcy Judge" or "conduct a full *de novo* hearing replete with witnesses and documentary evidence." *Id.*

⁹⁷ *Id.* The AOV court noted that the substantial evidence standard of review was adequate, regardless of whether the proceedings before the bankruptcy judge were "core" or "related" proceedings, as defined by the Emergency Rule. *Id.* at 1008 n.4; see *supra* note 93. In applying the substantial evidence test, the district court followed the decision of the Court of Appeals for the District of Columbia in *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir.), *cert. denied*, 103 S. Ct. 3088 (1983). *AOV Indus.*, 31 Bankr. Rep. at 1008. Although the district court distinguished *AOV* from *Kalaris* on the ground that *Kalaris* involved article III review of the findings of an administrative agency, the *AOV* court found analogous reasons for using the substantial evidence test in a bankruptcy context. *Id.*

⁹⁸ *AOV Indus.*, 31 Bankr. Rep. at 1008; see *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619 n.17 (1966) (*de novo* review not normally presumed absent statutory directive).

cious in the context of section 636(c). Since the third prong of the class 2 adjunct test proposed by this Note and the fourth prong of the class 1 adjunct test under *Northern Pipeline* both bar the application of a clearly erroneous standard, a substantial evidence standard would satisfy both tests.⁹⁹ Moreover, given the prerequisite of litigant consent under section 636(c), it is likely that a review standard less stringent than the *de novo* determination requirement upheld in *Raddatz* would be acceptable.¹⁰⁰

Thus, application of the substantial evidence test contravenes neither the will of Congress nor the constitutional guidelines set forth by the Supreme Court.¹⁰¹ Moreover, as the majority in *Pacemaker II* recognized, the real danger behind the Magistrates Act is not the encroachment of Congress on the judiciary, but rather the gradual dismantling of the article III system by its officers' overuse of the consensual reference system.¹⁰² A substantial evidence standard of review would counterbalance such overuse by incorporating into the system a protection that operates on a case-by-case basis, thereby ensuring a constitutional application of section 636(c) regardless of the number of cases delegated to magistrates in the future.¹⁰³

⁹⁹ See *Northern Pipeline*, 458 U.S. at 85. The plurality approved the standard of review to the recommendations of the Commission in *Crowell v. Benson* in the context of class 1 adjuncts. *Id.* Agency orders in *Crowell* "were to be set aside if 'not supported by the evidence.'" *Id.* Though this standard of review would appear to be a middle ground between "clearly erroneous" and "substantial evidence," the more stringent "substantial evidence" test, it is suggested, is appropriate in the class 2 arena, given the class 2 adjunct's broader powers and ability to assist in the adjudication of constitutional rights. See *supra* notes 29-30 and accompanying text. Significantly, Justice Rehnquist, concurring in *Northern Pipeline*, approved of the standard of review applied in *Crowell*, but found that application of the clearly erroneous standard in a bankruptcy context was a crucial factor in destroying the adjunct status of the bankruptcy judges created by the Bankruptcy Act. 458 U.S. at 91 (Rehnquist, J., concurring). Therefore, a majority of the Justices agreed that a standard of review akin to a substantial evidence test was sufficient to overcome article III concerns in a class 1 context.

¹⁰⁰ See *Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974), *quoted in* H.R. REP. NO. 1609, 94th Cong., 2d Sess. 3 (1976); *supra* note 80.

¹⁰¹ See *Northern Pipeline*, 458 U.S. at 85; *supra* note 79.

¹⁰² See *Pacemaker II*, 725 F.2d at 544.

¹⁰³ Cf. S. REP. NO. 74, 96th Cong., 1st Sess. 5, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1473. The Senate rejected the proposal "that specific categories of cases be designated for trial under proposed subsection 636(c)." *Id.* It is suggested that the substantial evidence standard of review limitation upon the magistrate's power is a far more effective method of preserving the integrity of the article III judicial system than the proposal rejected by the Senate. Limiting the magistrate's subject-matter jurisdiction would cripple the utility of the magistrate system, and defeat Congress' intention to reform the trial level of the federal

CONCLUSION

The Magistrates Act involves two competing federal interests at work that must be precisely balanced to ensure the constitutionality of the magistrate system. The federal interest in preventing dilution of the article III system through excessive delegation must be reconciled with the equally compelling need to maintain access to federal forums by reducing dockets and providing litigants with inexpensive and speedy trials. While section 636(c) approaches this balance, it lacks sufficient protections for periods during which the second federal interest may appear more compelling than the first.¹⁰⁴ The *Pacemaker II* court recognized that "[c]ontinued and vigilant supervision by article III judges is of course essential to the integrity of the system," but the court did not indicate how it planned to exercise this supervision.¹⁰⁵ Adoption of the substantial evidence standard of review would provide a self-imposed good-faith effort by the federal judiciary to give both "the appearance and the reality"¹⁰⁶ of article III vigilance.

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judiciary. See *supra* note 2.

¹⁰⁴ See 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 403 (1873), quoted in *Pacemaker II*, 725 F.2d at 548 (Schroeder, J., dissenting). Justice Story wrote:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government

Id.

¹⁰⁵ *Pacemaker II*, 725 F.2d at 546.

¹⁰⁶ See *id.* at 544.